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Native American Cases To Watch In 2017

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An eight-member U.S. Supreme Court in 2017 will examine two Native American cases early in the year. However, assuming President-elect Trump will nominate and the Senate will confirm a new justice in relatively short order, a newly reconstituted nine-member court may hear additional Indian law cases, possibly one or more dealing with the fallout from the 2009 decision in Carcieri v. Salazar. Other matters involving Indian gaming and payday lending are working their way up through the courts. For now, however, Lewis v. Clarke, involving tribal sovereign immunity, heard argument on Jan. 9, and the court will hear argument on Jan. 18 in Lee v. Tam, a matter that may implicate Native American law; both arguments will precede President-elect Trump's inauguration.

Law360 examines these and other Native American law cases to watch in 2017.

The court first heard Lewis v. Clarke, Docket No. 15-1500, to consider whether a tribe's sovereign immunity bars personal-capacity damages actions against tribal employees for torts committed within the scope of their employment. Here, the Mohegan Tribal Gaming Authority, an arm of the Mohegan Tribe of Indians of Connecticut, employed William Clark as a limousine driver for casino patrons. While driving casino patrons off the reservation, Lewis rear-ended a car and injured the occupants Brian and Michelle Lewis. Sued in his individual capacity in state court, Clarke claimed the protection of the tribe's sovereign immunity because he was acting within the scope of his employment. Ultimately, the Connecticut Supreme Court adopted this view, and the U.S. Supreme Court granted certiorari to review the question, presumably to resolve a conflict among lower courts on the question of the reach of tribal sovereign immunity to individual-capacity lawsuits.

The case has generated intense interest from trial lawyers, tribes, states and the federal government. Given its trust responsibility to tribal governments, the United States typically supports tribes, but here, the solicitor general filed an amicus brief supporting reversal of the Connecticut Supreme Court, arguing tribal sovereign immunity does not bar tort suits that seek damages against tribal employees in their personal capacity. However, the SG also argues federal common law official immunity should be available to protect the employee. The states of Texas, Colorado and New Mexico joined the National Congress of American Indians (NCAI) in supporting Clarke with an argument that the jurisdiction of state courts is principally a question of state law, and the question of sovereign immunity of governments other than the United States is a question of state law.

For the tribes, the case presents a serious challenge to tribal governments' sovereign interests, in particular, their interest in limiting the exposure of their employees to judgments in foreign courts. If the Supreme Court reverses here, tribes have argued that key tribal officers, such as tribal public safety officers, may be exposed to personal liability in suits brought in state courts, with concomitant adverse effects on tribal government as an employer and on tribal welfare.

Having granted certiorari here and not as of yet in a similar case involving the Tunica-Biloxi tribe of Louisiana (where the tribe lost), it appears the court may be leaning, not surprisingly, to narrow tribal sovereign immunity. This is especially the case given the solicitor general's brief on the side of the Lewises on the principal question.

While Lee v. Tam, Docket No. 15-1293, is not a Native American case, tribal interests have appeared as amici curiae, including the NCAI, Native American Rights Fund, Cherokee Nation, Navajo Nation and Yocha Dehe Wintun Nation in a combined brief. For years, these tribes and groups have taken a national role in combating trademarks offensive to and demeaning of Native Americans. At issue in Lee is section 2(a) of the Lanham Act, 15 U.S.C. 1052(a), which in general allows a trademark to be refused registration if it may disparage persons, institutions, beliefs or national symbols, or "bring them into contempt, or disrepute."

The case arises from the Court of Appeals for the Federal Circuit, in a matter involving a dance-rock band seeking federal registration for the mark "The Slants." The U.S. Patent and Trademark Office refused the mark as disparaging of persons of Asian ancestry. The appeals court held the disparagement provision facially invalid under the First Amendment and not a regulation of commercial speech, among other grounds. The United States sought certiorari, which was granted on Sept. 29, 2016.

In addition to the NCIA and tribal brief, an amicus brief supporting the government was filed by Amanda Blackhorse and the other Blackhorse defendants who are the parties in a high-profile case involving a challenge to Pro-Football Inc.'s "Redskins" trademark, currently pending in the Fourth Circuit. Set against the government are numerous amici arguing that the provision permits impermissible viewpoint discrimination and should be found unconstitutional. Whether the outcome of Lee v. Tam dictates the outcome of the Blackhorse litigation remains to be seen, but it seems quite likely to do so.

Among the most watched pending petitions for certiorari is Citizens Against Reservation Shopping v. Jewell, Docket No. 16-572, effectively revisiting the court's 2009 decision in Carcieri v. Salazar. The D.C. Court of Appeals upheld the secretary of interior's interpretation of the statutory definition of the term "Indian" for the purposes of taking land in trust under 25 U.S.C. section 465, where that statute refers to members of "any recognized Indian tribe now under Federal jurisdiction." The Carcieri court read the word "now" to refer to 1934, the year the Indian Reorganization Act was passed. In 2013, however, the secretary concluded that she was authorized to take land into trust for the Cowlitz Tribe in Washington state because the tribe was both a "recognized Indian tribe" and "under Federal jurisdiction" within the meaning of the IRA, although the Cowlitz was not on a list of recognized tribes in 1934. The Court of Appeals generally upheld the secretary and found two sets of words in the phrase ambiguous, and opined the secretary's interpretation was reasonable. Nonetheless, the interpretation effectively un-does Carcieri, and the plaintiffs challenged it, leading to this petition for certiorari. The court has granted additional time for the government to respond.

This is a case where, if cert is granted, a nine-member court may make a difference, particularly if the Citizens group manages to convince a fifth justice. Five Justices in the Carcieri majority are still on the court: Justices Thomas (who authored Carcieri), Kennedy, Breyer, Alito and Chief Justice Roberts. Justice

Breyer, however, added a number of qualifications to his joining in the majority opinion, among them his view that a tribe may have been "under Federal jurisdiction" in 1934 even though the federal government did not believe so at the time. He also noted the statute imposes no time limit upon recognition. The government's argument in this case may resonate with Justice Breyer precisely because of the view he expressed in his concurrence. Accordingly, the Citizens group will have to pin their hopes on a new ninth justice or on peeling off Justice Ginsburg, who in Carcieri joined then-Justice Souter's concurrence in part and dissent in part. There, the justices would have remanded to allow the secretary to argue that the two concepts, recognition and jurisdiction, may be given separate content.

The stakes in Citizens are high. The case may affect more than the Cowlitz Tribe, such as tribes for whom land was taken in trust on their behalf, but which were not listed among "recognized" tribes in 1934. If the court grants certiorari and un-does Citizens' un-doing of Carcieri, land taken in trust may be taken out of trust, which will trigger an legal earthquake in Indian country of considerable magnitude.

Additional trends worth watching in Native American law include the cases relating to payday lending. Where tribal business entities engaged in consumer finance — especially over the internet — have succeeded in demonstrating they are "arms of the tribe," they have been able to rely on attributes of tribal sovereignty against claims of unreasonable interest rates. But the federal Consumer Financial Protection Bureau has been aggressive in investigating and pursuing tribal lending schemes, asserting its comprehensive and preemptive authority. It likely will continue to pursue the tribal lenders' financiers, the banks and entities behind the tribal entities, treating these as the "true" lenders, who do not enjoy tribal sovereign immunity. In August, the CFPB prevailed in federal court in California in CFPB v. CashCall Inc., et al., No. CV-15-7522, which upheld the bureau's assertion that notwithstanding the lending company's affiliation with a tribally based company, the company was the "true lender," and subject to the usury rates of several states. Even the California Supreme Court is in on the act, having reversed and remanded in The People ex rel. Jan Lynn Owen v. Miami Nation Enterprises et al., No. BC373536. It rejected the claims of payday lending entities associated with the Miami Tribe of Oklahoma and the Santee Sioux Nation in Nebraska that they operated as an "arm of the tribe" and were protected by tribal sovereign immunity. The California court adopted a five-factor test to determine whether immunity applies to these entities. Litigation will continue over the efficacy of arbitration clauses, the reach of the federal consumer agencies, the application of state UDAP laws against financiers as "true" lenders and related issues. Looking forward in 2017, the current trend is running against the tribal payday lending industry, with multiple state and federal agencies actively looking to use their enforcement powers.

In the field of Indian gaming, disputes in Arizona, New Mexico and California continue to draw attention. A full trial will occur in 2017 to determine whether the Tohono O'odham Nation can offer class III casino-style games at the Desert Diamond West Valley Casino and Resort in Glendale. The Arizona gaming director has not issued a class III gaming license under the compact, as the state has maintained the nation's representatives made oral misrepresentations during compact negotiations. More class III gaming compacts were approved in New Mexico, giving that state 15 tribes with approved gaming compacts. However, the Pojoaque Pueblo agreement is still tied up in litigation over disagreements on revenue sharing, among other matters, and likely to continue in 2017.

In 2017, the California Supreme Court will entertain petitions for review to resolve a conflict in the district courts of appeal as to whether the California governor has the power — implied or otherwise — to concur with the secretary of interior in the two-part determination relating to the suitability for gaming on post-1988 acquired trust lands, without state legislative authorization or ratification. The Sacramento-based Third District Court of Appeal in United Auburn Indian Community v. Brown held the

governor's action was an executive act, not requiring legislative authorization, as it effectuated what was already an established gaming policy in the state. Directly conflicting is Stand Up for California v. State of California, et al., decided by the Fifth District Court of Appeal. In three separate opinions with divergent rationales, the Fresno-based appeal court found Governor Jerry Brown's unilateral exercise of the power was unsupported by state law. Assuming review is granted, at stake are already-approved casinos planned by two tribes, using secretarially issued procedures in lieu of a compact, on land taken into trust predicated on the gubernatorially concurred-in two-part determination needed to make lawful tribal gaming on these parcels. Throughout the process, the two tribes at issue — the Enterprise Rancheria and North Fork Rancheria — have faced controversy, local opposition, a state-wide referendum rejecting one compact and the Legislature's pass on the other compact, and considerable opposition by neighboring tribes that maintained they were not adequately consulted in the process.

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